EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE.—Where incriminating evidence has been forcibly seized from the defendant in a criminal prosecution, what remedies are available for the vindication of his rights under the Fourth Amendment or similar provisions in the state constitution? It is, of course, well settled, even in the absence of written constitutional provisions,[1] that an action of trespass lies against the officer guilty of such seizure.[2] But, whatever doubts may exist to-day as to the policy of a rule which serves to impede prosecutions irrespective of the guilt or innocence of the accused, it seems clear that the Fourth Amendment was intended to be such a rule.[3] Unless the defendant is enabled not only to recover damages for an unconstitutional seizure, but also to prevent the use against him of evidence thereby obtained, the purpose of the Amendment is for all practical purposes nullified; and accordingly it has been held by a few courts that evidence thus obtained is inadmissible.[4]

After a period of uncertainty caused by the sweeping *dicta* in *Boyd* v. *United States*,[5] it now seems to be settled both in the federal and in the great majority of state courts, that if evidence is relevant and material, it will not be excluded merely because obtained by illegal seizure;[6] unless the proceeding compelled the defendant to give evidence against himself by the performance of an affirmative act,[7] or, unless the seizure was made under color of a law so broad as to be repugnant to the constitution.[8] The reason ordinarily assigned is either that the prohibition of unlawful searches and seizures is operative only against the government, and that when an officer illegally obtains evidence, he is acting as a private individual;[9] or that though the defendant's constitutional rights have been violated, his remedy is by direct and not by collateral attack.[10]

The first argument seems objectionable as being based upon the fiction that an officer who illegally procures evidence is not acting in behalf of the government. Moreover, it proves too much. It would at once dispose of the great bulk of illegal seizure cases, for police officers and prosecuting attorneys have shown far greater disposition

[1]Entick *v.* Carrington (1765) 19 How. S. Tr. 1029.

[2]Buckley *v.* Beaulieu (1908) 104 Me. 56; Krehbiel *v.* Henkle (1909) 142 Ia. 677, on appeal after second trial (1911) 152 Ia. 604.

[3]See Boyd *v.* United States (1886) 116 U. S. 616.

[4]State *v.* Sheridan (1903) 121 Ia. 164; Underwood *v.* State (Ga. App. 1913) 78 S. E. 1103, apparently disregarding Williams *v.* State (1897) 100 Ga. 511; and see 1 Virginia Law Rev. 70; State *v.* Slamon (1901) 73 Vt. 212; but see State *v.* Krinski (1905) 78 Vt. 162. United States *v.* Wong Quong Wong (D. C. 1899) 94 Fed. 832, holding to that effect, is, of course, no longer law. See note 6, *infra.*

[5]*Supra.*

[6]Adams *v.* New York (1904) 192 U. S. 585; Shields *v.* State (1893) 104 Ala. 35; Williams *v.* State, *supra;* Imboden *v.* People (1907) 40 Colo. 142; see Commonwealth *v.* Brelsford (1894) 161 Mass. 61; 4 Columbia Law Rev. 60.

[7]See Boyd *v.* United States, *supra;* Evans *v.* State (1899) 106 Ga. 519.

[8]Dupree *v.* State (1909) 102 Tex. 455; see Lawrence *v.* State (1906) 103 Md. 17.

[9]Lawrence *v.* State, *supra;* Imboden *v.* People, *supra.*

[10]Shields *v.* State, *supra.*

to violate the right of personal security than legislators. But furthermore, if carried to its logical conclusion, it would render the Amendment ineffectual in any case whatsoever; for if the seizure were under an unconstitutional statute or illegal warrant, the statute or the warrant would be a mere nullity, and therefore, the seizure could no more than in any other case be considered violative of the Amendment. As a matter of fact, the evidence has in most jurisdictions been admitted indifferently whether obtained under color of an illegal warrant[11] or not.[12]

It appears, therefore, that the true basis of most of the decisions is the argument that the means of obtaining evidence are not open to collateral inquiry. This is undoubtedly sound as a general proposition;[13] but it should be inapplicable where its effect is to degrade a constitutional privilege to the level of a mere rule of private law. It is so limited with regard to self-incrimination;[14] and there seems to be no valid distinction in this respect between the Fourth and Fifth Amendments. This theory is, nevertheless, undoubtedly supported by the great weight of authority.

A novel application of it was made in the recent case of *Weeks* v. *United States* (U. S. Sup. Ct., 1914. Not yet reported.) Here certain criminatory papers of the defendant were seized without a warrant. An application for their return, made to the court before trial, was denied; and upon the trial the papers were admitted in evidence. The Supreme Court held that the constitutional rights of the defendant had been violated, and reversed the conviction. While this decision is, perhaps, a necessary logical result of the accepted doctrine,[15] the conclusion that in all the many cases where unconstitutionally obtained evidence has been admitted, the result might have been reversed by a mere twist of procedure, certainly throws grave doubt upon the soundness of that doctrine.

PLEDGE OF CHATTELS WITHOUT PHYSICAL DELIVERY.—Delivery and continued possession are essential to the existence of a valid pledge,[1]

---

[11]Ripper *v.* United States (C. C. A. 1910) 178 Fed. 24, rehearing denied (1910) 179 Fed. 497; Hardesty *v.* United States (C. C. A. 1908) 164 Fed. 420; People *v.* Aldorfer (1911) 164 Mich. 676.

[12]People *v.* LeDoux (1909) 155 Cal. 535; Commonwealth *v.* Tibbetts (1893) 157 Mass. 519; Gindrat *v.* People (1891) 138 Ill. 103; but see, under express words of constitution, State *v.* Griswold (1896) 67 Conn. 290.

[13]Wigmore, Evidence, § 2183.

[14]See Shields *v.* State, *supra;* Evans *v.* State, *supra.*

[15]The petition should have been granted. United States *v.* McHie (D. C. 1912) 194 Fed. 894; *cf.* United States *v.* Wilson (C. C. 1908) 163 Fed. 338; see Newberry *v.* Carpenter (1895) 107 Mich. 567; Rickers *v.* Simcox (1876) 1 Utah 33; but see N. Y. Cent. & H. R. R. R. *v.* United States (C. C. A. 1908) 165 Fed. 833, 842.

[1]See authorities collected in Jones, Pledges (3rd ed.) § 23 *et seq.* The reason generally assigned for this rule is the impolicy of permitting ostensible ownership by the pledgor, since it in most cases gives rise to a false credit. Unless, therefore, due care has been taken to negative such an appearance, the lien will not be upheld. Fourth St. Nat. Bank *v.* Millbourne Mills (C. C. A. 1909) 172 Fed. 177; Philadelphia Warehouse Co. *v.* Winchester (C. C. 1907) 156 Fed. 600.